Calendar No. 808

101ST CONGRESS
2d Session

SENATE

REPORT
101-453

OCCUPATIONAL SAFETY AND HEALTH HAZARDS VICTIMS' RIGHT ACT

SEPTEMBER 10, 1990.—Ordered to be printed

Mr. KENNEDY, from the Committee on Labor and Human Resources, submitted the following

REPORT

[To accompany S. 2442]

The Committee on Labor and Human Resources, to which was referred the bill (S. 2442) to amend the Occupational Safety and Health Act of 1970 to expand the rights of victims of occupational safety and health hazards, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

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The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Occupational Safety and Health Hazards Victims' Rights Act".

SEC. 2. PURPOSES.

It is the purpose of this Act—

★(Star print)

S543-26.

(1) to ensure that victims of workplace accidents and conditions are informed about inspections and investigations relating to the circumstances of their accidents or exposure to chemicals or products that led to disease;

(2) to provide victims of workplace accidents and disease an opportunity to participate in proceedings relating to the circumstances of their accidents and disease; and

(3) to ensure that injured and diseased employees and their family members are accorded the consideration and respect due to them.

SEC. 3. OCCUPATIONAL SAFETY AND HEALTH HAZARDS VICTIMS' RIGHTS.

The Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.) is amended—

(1) by redesignating sections 28 through 33 as sections 29 through 34, respectively; and

(2) by inserting after section 27 the following new section:

"SEC. 28. OCCUPATIONAL SAFETY AND HEALTH HAZARDS VICTIMS' RIGHTS.

"(a) DEFINITIONS.—As used in this section:

"(1) ACCIDENT.—The term 'accident' means the circumstances relating to the death, injury, or illness of an employee.

"(2) FAMILY MEMBER.—

"(A) IN GENERAL.—The term 'family member' may include a parent, legal guardian, spouse, brother, sister, or child of an employee.

"(B) NO FAMILY MEMBER.—In a case in which a family member cannot be identified and a deceased employee has no legal representative, the Secretary may grant 'family member' status to any interested coemployee or acquaintance of the deceased employee.

"(3) VICTIM.—The term 'victim' means—

"(A) an employee who has sustained an injury or suffered an illness as a result of an accident or condition that results in an inspection or investigation conducted under section 8; or

"(B) a family member of an employee, if—

"(i) the employee is killed as a result of an accident or condition that results in an inspection or investigation conducted under section 8; or

"(ii) the employee sustains an injury as a result of an accident or condition that results in an inspection or investigation conducted under section 8, and the employee cannot reasonably exercise the rights of the employee under this section.

"(b) VICTIMS' RIGHTS.—Notwithstanding any other provision of law, on request, a victim shall be afforded the right (with respect to an injury, illness, or death involving the victim) to—

"(1) meet with the Secretary or an authorized representative relating to the death, injury, or illness of an employee prior to the issuance of a citation, or report of no action, as the result of an inspection or investigation conducted under section 8;

"(2) receive, at no cost, a copy of the citation or report at the time of issuance; and

"(3) appear and participate as a party at all proceedings conducted under section 10.

"(c) SETTLEMENT DISCUSSIONS.—Prior to entering into a settlement agreement as a result of an inspection or investigation conducted under section 8, on request, the Secretary shall provide an opportunity to appear and make a statement before the parties conducting the settlement negotiations to—

"(1) the employee who suffered a serious bodily injury as a result of an accident or condition that resulted in the inspection or investigation;

"(2) a family member of the employee, if the family member is a victim; and

"(3) the employee representative of the employee.

"(d) VICTIMS' ACCESS TO INFORMATION AND DOCUMENTS.—

"(1) IN GENERAL.— A victim shall have the right to obtain, at no cost and within a reasonable period of time, all public documents relating to an inspection or investigation by the Secretary into an accident resulting in the death, injury, or illness of an employee.

"(2) WAIVER OF WITNESS CONFIDENTIALITY.—If a witness is interviewed as part of an inspection or in investigation conducted under this Act, the Secretary shall provide the witness with a form on which the witness shall indicate—

(A) the willingness of the witness to waive confidentiality to victims; or

(B) the unwillingness of the witness to waive confidentiality to victims.

(e) REMEDIES.—On a violation of this section, in addition to any other remedies that might be available to a victim under Federal or State law, a victim shall be entitled to—

"(1) declaratory relief;

"(2) injunctive relief;

"(3) any costs incurred by the victim in securing the documents referred to in subsections (b)(2) and (c); and

"(4) reasonable attorney fees and costs.

"(f) NOTIFICATION.—The Secretary shall take reasonable actions to inform victims of their rights under this section.".

SEC. 4. CONFORMING AMENDMENT.

Section 10(c) of the Occupational Safety and Health Act of 1970 (20 U.S.C. 659(c)) is amended by adding at the end the following new sentence: " A victim shall have the opportunity to participate in a proceeding conducted under this section in accordance with section 28.".

SEC. 5. EFFECTIVE DATE.

This act and the amendments made by this Act shall—

(1) become effective on the date of enactment of this Act; and

(2) apply to all investigations and proceedings pending or conducted on or after such date.

I. SUMMARY

S. 2442, the Occupational Safety and Health Hazards Victims' Rights Act, would grant rights to certain victims of workplace accidents or conditions. The rights extended to victims are: (1) the right to a pre-citation meeting with the Occupational Safety and Health Administration (OSHA); (2) the right to participate as a party in hearings conducted pursuant to section 10 of the Occupational Safety and Health Act of 1970 (OSH Act); and (3) the right to obtain copies of the citation and investigative report, free of charge, and within a reasonable period of time.

The bill defines the term "victim" to include workers who are injured or suffer an illness as a result of a workplace accident or condition, or a family member of a worker if the employee is killed or incapacitated (injured to the extent that the employee cannot reasonably exercise the rights of an employee under this Act). The rights extended to these victims are contingent upon the individual making a request, and are extended only to those victims who are injured or suffer an illness as a result of an accident or condition triggering an investigation or inspection under Section 8 of the OSH Act. Section 8 investigations or inspections are conducted only when an accident or condition leads to a death or multiple hospitalizations.

For certain victims and the employee representative, the bill also provides a right to make a statement before those conducting settlement negotiations. Victim involvement in settlement negotiations is strictly limited to those who are seriously injured, or to the family member of a worker, if the worker is killed or incapacitated. Victim participation is limited and is intended to sensitize those conducting the negotiations to the severity of effects of the OSH Act violation. Victims are not parties to the settlement, and do not have veto power over the agreement.

In addition, the bill requires the Secretary to notify witnesses interviewed as part of the investigative process that they may waive confidentiality to victims. The bill also provides that the Secretary shall take reasonable actions to advise victims of their

rights under this Act. Remedies available for violations under the Act are injunctive relief, declaratory relief, costs incurred in obtaining a copy of the citation or investigative report, and reasonable attorney fees and costs.

II. BACKGROUND AND NEED FOR THE LEGISLATION

After reviewing a series of workplace accidents, the Committee determined that the Occupational Safety and Health Administration's (OSHA) procedures kept victims and family members of workers who died or were injured in workplace accidents in the dark. They had limited access to information and little or no opportunity to participate in the government decisionmaking process associated with the enforcement or correction of job safety and health violations, even when those violations led to death or serious injury.

Under OSHA's procedures, family members of injured or killed workers were treated like "outsiders" with no rights or privileges with regard to the procedures of our government. OSHA met with employers charged with serious violations and negotiated remedies, but negotiations almost never included the participation of injured workers or their families. Victims were locked out of the process, and penalties meted out often amounted to a mere slap on the wrist. Victims of workplace accidents and their families suffer enough from the accident itself. They should not be victimized and traumatized again by the government agency investigating the accident.

Examples of the fundamental unfairness of present OSHA procedures come from all over the country.

Lee and Mary Doyle of Bloomington, Illinois—In 1983, the Doyles lost their only son, Tim, when he as electrocuted in a workplace accident. The Doyles received no information about Tim's death from OSHA. In 1988, the National Safe Workplace Institute, a Chicago not-for-profit research and education organization, drafted a Freedom of Information Act request for Mr. and Mrs. Doyle to help them get a copy of the citation. OSHA then wrote the Doyles and told them that they could have a copy of the citation—but there was a catch. The Doyles were told that first they would have to agree to pay search and copy fees that could amount to $50.00 before OSHA would give them the documents.

The "Bastian Plating" families, of Auburn, Indiana.—In 1988, the worst factory accident in the history of OSHA felled five young men, aged 19–29, at Bastian Plating in Auburn, Indiana. The five young men, four of whom were would-be rescuers, were asphyxiated in a confined space accident. The tragic accident shocked Auburn, the people of Indiana and those who believed that American workplaces were safe. This horrible tragedy demonstrated that work in the United States can still be far too dangerous. The families filed a petition with Indiana OSHA for party status at a hearing challenging the issuance of the citation for OSHA violations. Under current law, affected employees and employee representatives are parties to hearings on appeals of citations. The family members in this case requested that party status be extended to them. The nature of this tragedy demanded compassion for the

families. The request, however, was dismissed in a single sentence: "After checking the Act very carefully it is apparent that we cannot grant this special request for party status."

Heidi Yantes of Mantua, Utah.—In 1988, Heidi Yantes' husband Bryan was crushed to death in a tragic accident at a steel processing facility in Brigham City. Bryan Yantes, 27, was killed in an accident similar to one that killed Jan Gray, 25, just six months before at the same facility. Utah OSHA did not cite the employer in Jan Gray's death, even though the inspector's report indicated safety violations. After Yantes' death, Utah OSHA issued a citation for serious violations, but imposed only a $560.00 fine. The story did not end there. In late 1989, Heidi requested a copy of the citation. After initial reluctance, the Utah OSHA official gave her the document. Unfortunately, Heidi read that the citation had been deleted following a meeting between Utah OSHA and the employer's attorney. In Heidi Yantes' view, a very modest government enforcement action stemming from a tragedy had been transformed into a non-event, without a single opportunity for her family's point of view to be heard.

In all three cases, serious violations of the Occupational Safety and Health Act were alleged against an employer. In all three cases, one or more workers died. Yet, the aggrieved family members were denied fundamental rights to information and to participate in the investigation.

Last year, the National Safe Workplace Institute undertook a survey in all 50 states of 203 families who had lost a family member to a workplace accident in recent years. The Institute wanted to learn about two issues. First, the Institute wanted to know what surviving families thought of OSHA and, second, if such families would exercise rights to participate if granted the opportunity.

The findings with respect to OSHA were:

93 percent of the surviving families said that they believed that OSHA should explain its procedures;

86 percent said they should have the right to meet with OSHA before the investigative files are closed;

70 percent said that they had no idea what OSHA was doing in their case; and

49 percent said that they had not seen the citation or investigative report.

The findings with respect to their rights were:

98 percent said that they should know when and if OSHA was meeting with employers;

86 percent said that they should have a right to meet with OSHA before the investigative files were closed; and

Only 2 percent said they would not attend such meetings if they had the right.

The Institute also made an appraisal of how much time it took for OSHA to provide a copy of the citation, when this information was requested. The average time that it took to receive the information was in excess of eight months following the accident.

In contrast, a copy of the citation is typically mailed to an employer within 10 days of such an investigation.

Comments on the survey forms reveal that governmental disregard for the rights of victims has caused a great deal of disenchantment. Many victims of workplace accidents are angry and bitter. When one multiplies these sentiments by the number of workers killed or seriously injured in recent years, it is easy to come to the conclusion that such decisions only weaken the respect and expectations that citizens have for government.

On April 5, 1990, Senator Simon, Senator Metzenbaum and Senator Kennedy introduced S. 2442 to address the issue of victim involvement, by providing victims and their families with the right to participate in the investigation process and to have access to information regarding OSHA's investigation. On April 16, 1990, at a hearing of the Committee on Labor and Human Resources on S. 2442, Assistant Secretary for Occupational Safety and Health, Gerard Scannell expressed agreement on the need for some action to address this problem:

> I would like to express my particular appreciation to you, Mr. Chairman, for your efforts to bring this important issue to the nation's attention. Last fall, before I was confirmed as Assistant Secretary of OSHA, you and I met in Washington. You told me of your concerns that OSHA be less bureaucratic and more compassionate towards family members of workplace accident victims. You asked me to review the matter and make any changes that I could. I also met with Mr. Joseph Kinney of the National Safe Workplace Institute, and he discussed the same issue. I told both of you that I agreed wholeheartedly with your concerns and that I would take action as Assistant Secretary to assure that families of victims are accorded the respect and courtesy that I would want to receive if a member of my family was a victim of a workplace accident.

At the hearing, Assistant Secretary Scannell announced that he had just issued an administrative directive to ensure the involvement of victims. The directive is limited, however, in that it applies only to family members of those who die in workplace accidents. For these family members, it provides for a briefing prior to the issuance of a citation, free and timely copies of citations and investigative reports, and contact between OSHA and the family member regarding the status of the case.

When a government agency investigates a workplace accident, it is only logical that victims of that accident should be able to participate in the process. The rights extended to victims in S. 2442 are simple basic rights that all victims of workplace accidents should have based on principles of fairness and decency. In addition, there are other important public policy reasons for the extension of such victims' rights. At the hearing on April 16, Dr. Marie Claude-Rigaud, a Board-certified psychiatrist and Fellow of the American Psychiatric Association who is currently associated with the University of Illinois Occupational Health Administration, testified on the public health aspects of S. 2442:

> My perspective on this legislation is as a medical practitioner and also as a public health professional. Let me advise you, Mr. Chairman, this legislation is an important public health and pro-family measure that deserves to be passed by the Congress and signed into law.
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> It has been stated that the most prominent source of psychological disorder, whether chronic or acute, is the death or severe injury of a family member or a close friend.
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> Mr. Chairman, the death of a family member from an event like a sudden workplace accident can trigger a series of dysfunctions as "victims" get on with the work of mourning. It makes no sense that the government add to this burden by denying "victims" access to the processes and decisions that the government uses. Indeed, there are few events of greater importance to the lives of citizens than such investigations. By opening the process to these "victims" we are, in effect, encouraging "damage control" and therefore encouraging preventative health. In closing, S. 2442 should be seen as more than just "rights" legislation, but also preventative health legislation.

In addition, Jan Chatten-Brown, Special Assistant to the Los Angeles District Attorney, testified on the positive effect S. 2442 would have on enforcement.

> I would also like to express strong support for the Victim's Access Bill. The impact of requiring affected workers, or the surviving family members of victims, to be allowed to participate in the regulatory process is far greater than might appear at first blush. Based upon personal experience, I can assure you that there are few ways to more effectively strengthen the resolve of an individual engaged in enforcement than to see first hand the pain and personal suffering that the violation has brought to the victim or the victim's family member. I have shared the tears with grieving mothers and fathers, and am convinced that their participation in the OSHA process will ultimately diminish the reduction in penalties and give Fed OSHA both the backbone and heart that it needs to fulfill the purpose of the OSHA Act to "assure so far as possible every man and woman in the nation safe and healthful working conditions."

III. HISTORY OF THE LEGISLATION

S. 2442, a bill to extend certain rights to victims of workplace accidents and conditions, was introduced on April 5, 1990, by Senator Simon, for himself, Senator Metzenbaum and Senator Kennedy. The bill was referred to the Senate Committee on Labor and Human Resources. A field hearing on S. 2442 was held in Chicago, Illinois, on April 16, 1990, and on May 1, 1990, a hearing was held

in Washington D.C., on S. 2442, S.2154, the OSHA Criminal Penalty Reform Act, and S. 490, the OSHA Civil Penalties Act. S. 2442 was considered on June 27, 1990 at an executive session of the Committee on Labor and Human Resources. A substitute amendment was offered by Senator Simon. The substitute amendment was accepted by the Committee by a voice vote and the bill was reported favorably by the Committee by a voice vote on June 27, 1990.

IV. HEARINGS

A field hearing was held on April 16, 1990 by the Committee on Labor and Human Resources in Chicago, Illinois. The hearing was held to explore the need to involve victims and their families in the OSHA inspection and investigation process. The Committee heard testimony from:

(1) Honorable Gerard Scannell, Assistant Secretary for Occupational Safety and Health, U.S. Department of Labor, Washington, D.C.

(2) Lee and Mary Lou Doyle, Bloomington, Illinois

(3) Edward and Rosemarie Sochacki, South Holland, Illinois

(4) Edna Freeze, Bloomington, Illinois

(5) Brenda Fogle, Auburn, Indiana

(6) James J. Holzhauer, Esq., University of Chicago Law School, Chicago, Illinois

(7) Marie Claude-Rigaud, MD, MPH, Occupational Health Clinic, Cook County Hospital, Chicago, Illinois

(8) Joseph A. Kinney, Executive Director, National Safe Workplace Institute, Chicago, Illinois

On May 1, 1990, the Subcommittee on Labor held a hearing in Washington D.C., on S. 2442, the Occupational Safety and Health Hazards Act, S. 2154, the OSHA Criminal Penalty Reform Act, and S. 490, the OSHA Civil Penalties Act.

The Committee heard testimony from:

(1) Honorable Frank R. Lautenberg, U.S. Senator from New Jersey

(2) Honorable Tom Lantos, U.S. Representative from California

(3) Charlene Gadsden, Bridgeport, Connecticut

(4) Roxanne L. DeLuise, Allentown, Pennsylvania

(5) Joseph A. Kinney, Executive Director, National Safe Workplace Institute

(6) Gerard F. Scannell, Assistant Secretary for the Office of Occupational Safety and Health, accompanied by Robert Davis, Solicitor, Department of Labor, Washington, D.C.

(7) Margaret Seminario, Director, Occupational Safety and Health Department, AFL–CIO, Washington, D.C.

(8) George C. Freeman, Jr., Partner, Hunton & William, Richmond, Virginia, on behalf of the U.S. Chamber of Commerce

(9) Kirk Fordice, President, Associated General Contractors of America, Washington, D.C.

(10) Jan Chatten-Brown, Special Assistant to the Assistant Attorney, Los Angeles, California

V. COMMITTEE VIEWS

A. A Legislative Approach to Ensuring the Participation of Victims in the Investigation of Certain Workplace Accidents

The Committee believes that ensuring the participation of victims in the investigation of certain workplace accidents should be secured through statutory provisions. On April 13, 1990, Assistant Secretary Scannell issued a directive (OSHA Instruction CPL 2.89) providing family members of workers killed in workplace accidents with certain rights, including the right to have a briefing with OSHA and to obtain copies of citations and investigative reports, free of charge. While the administrative directive issued by Assistant Secretary Scannell is a good start, legislation is needed to ensure that the protections granted to victims are effective and not subject to the whims of individual OSHA administrators. Administrative directives may be rescinded at any time. It is possible that a future Assistant Secretary of Labor for Occupational Safety and Health may not agree with the policy of extending rights to victims. In fact, at the May 1, 1990 hearing, Joseph Kinney testified that former Assistant Secretary for Occupational Safety and Health, John Pendergrass, indicated that he strongly opposed the idea of involving victims in the process.

In addition, S. 2442 includes key protections not included in OSHA's current administrative directive. For example, the directive applies only to family members of employees who are killed in workplace accidents, and does not extend any protections to family members of victims who are incapacitated or those who become seriously ill as a result of a Section 8 workplace accident or condition. Nor does it extend protections to the injured workers themselves.

S. 2442 provides that an injured worker and a family member of an injured worker who is incapacitated also will have certain basic rights. At its May 1, 1990 hearing, the Committee heard the testimony of Roxanne DeLuise. Mrs. DeLuise's husband, David, was doused with 220 degrees water, chemicals and steam. David DeLuise lay incapacitated in a hospital bed, swollen from his normal 165 pounds to nearly 350 pounds. Every day 10–20 liters of fluids and 3 liters of blood were pumped into his body. David DeLuise eventually died as a result of his injuries. The Committee believes that, even prior to his death, while David DeLuise was incapacitated, Roxanne DeLuise should have had the right to meet with the OSHA officials conducting the investigation of the accident at Bethlehem Steel that caused her husband's injury. There simply is no reason to exclude family members of those who are incapacitated in workplace accidents.

OSHA's administrative directive also does not provide for victim participation in settlement negotiations or participation in Section 10 hearings. As discussed below, these are important rights that should be provided to certain victims of workplace accidents.

Moreover, under current law, OSHA lacks the ability to require compliance with its directives by state governments having occupational safety and health jurisdiction (State-Plan states). There are 23 State-Plan states. Although OSHA provides for up to half the

cost of State-Plan programs, it lacks the authority to ensure that states comply with OSHA directives. OSHA either approves a State-Plan and provides funding, or rejects the State-Plan. OSHA lacks the flexibility to deny a portion of funds to such governments. Currently, there are a number of State-Plan states that do not fully comply with a number of federal OSHA policies. The most conspicuous example is the egregious penalty policy (involving citations of $100,000 or more). Federal OSHA, which regulates about 60% of the U.S. workforce covered by OSHA, has issued about 90 such proposed penalties. The State-Plan states, which have jurisdiction over the remaining portion of the workforce, have issued no more than five such citations. Clearly, State-Plan states have not vigorously enforced this policy.

The most effective way to ensure that State-Plan states provide basic victims' rights is to guarantee the rights in statute, and provide legal remedies for denial of these rights. S. 2442 provides the necessary guarantees.

B. The Scope of Coverage of S. 2442 is Not Overly Burdensome

S. 2442 extends simple basic rights to victims of workplace accidents. While the Committee believes that all victims of workplace accidents should be contacted and advised of their rights, the scope of coverage extended in S. 2442 is limited in response to concerns raised about the logistics of contacting and extending rights to anyone injured in a workplace accident. Accordingly, the rights extended in S. 2442 must be requested by the victim, and the bill applies only to injuries or deaths that occur in reported accidents under Section 8 of the OSH Act; these are serious accidents involving deaths or multiple hospitalizations. According to the Department of Labor, there were 1,346 accidents during the one-year period from October 1988 to September 1989 that resulted in an inspection under Section 8. The bill also limits family member involvement to those cases involving the death or incapacitation of the injured worker.

In summary, the scope of coverage in S. 2442 is limited to serious accidents, the rights are extended only after request by the victim, and family members are extended rights only in cases involving a death or incapacitation. The Committee believes that these provisions should impose no undue burden on the Department of Labor.

C. Victim Participation Will Facilitate Successful Settlement Discussions

The Committee has concluded that some victims should be afforded the opportunity to participate in the settlement process, prior to an agreement being reached. S. 2442 extends such participatory rights to workers who are seriously injured, or to a family member if the worker is killed or incapacitated. Witnesses at Committee hearings demonstrated the need for victim participation in settlement negotiations. When Roxanne DeLuise's husband was boiled to death, the fine was settled at $1,000; when a scaffolding collapsed and killed Joseph Kinney's brother, the fine was settled at $800, and when Lee and Mary Doyle's son was electrocuted, the fine was settled at $240. All these incidents involved serious federal

safety violations. Such low fines will do little to deter future violations of the OSH Act. The Committee believes that victim participation will help ensure that penalties assessed by OSHA reflect the seriousness of the violations.

Precedent for victim involvement in settlement negotiations can be found in class action suits, where members of the affected class are afforded the right to comment on a proposed settlement. In addition, states provide for substantial victim participation in criminal cases. In 1988, the U.S. Department of Justice, Office of Justice Programs, Office for Victims of Crime published a survey of the various state victims' rights laws entitled "Victim Rights and Services: A Legislative Directory 1987" ("DOJ Victims Rights Directory"). According to the DOJ Victims Rights Directory, 48 states have passed legislation affording victims the right to participate at sentencing. In fact, many states permit victims to express their opinion as to the appropriate sentence to be ordered. Such involvement is referred to as a Victim Statement of Opinion (VSO). The most common method of legislatively-mandated VSO is one that provides victims the right to express their opinions orally at the sentencing hearing itself. According to the DOJ Victims Rights Directory, 35 states currently have enacted legislation providing for victim allocution or other ways of directly presenting a victim's opinion.

Moreover, the DOJ's Victims Rights Directory indicates that 23 states provide for victim participation in plea bargaining and 38 states provide for victim participation in parole hearings.

The intent of the settlement provisions of S. 2442 is to sensitize those conducting negotiations to the effects that the OSHA violation has had on people's lives. Concerns have been raised that, as originally drafted, the bill's language could have been read broadly to extend to an injured worker or family member a veto power over settlement agreements, and may have required participation in every discussion involving settlement. Concerns were also raised that individuals who suffered minor injuries should not be afforded the right to participate in settlement negotiations. The substitute amendment offered by Senator Simon and approved by the Committee addresses these concerns by providing for limited participation in settlement negotiations. The amendment makes it clear that certain victims have only the right to make a statement—they are not parties to the settlement. Furthermore, the right is extended only to victims who suffer serious injuries, or family members if the employee dies or is incapacitated.

D. Participation in Hearings Conducted Under Section 10

Section 10 of the OSH Act provides for hearings where an employer intends to contest a citation, or where employees or the representative of employees challenge the reasonableness of the period of time fixed for abatement of violations. Current law provides that affected employees or representatives of affected employees will have an opportunity to participate as parties to hearings under this subsection. S. 2442 provides that family members of workers who die or are incapacitated in accidents resulting in a Section 10 hearing, also shall be permitted to participate in these hearings.

Family members of the workers who died in the Bastian Plating accident in Auburn, Indiana requested permission to participate in the hearing contesting the citation, and their request was denied. The Committee believes there is no justification for excluding family members of workers who die or are incapacitated in workplace accidents or from workplace conditions from participating in hearings on the issuance of a citation as a result of the OSHA violations that caused that accident or condition.

VI. VOTE IN COMMITTEE

On June 27, 1990, the Senate Committee on Labor and Human Resources voted to adopt and report S. 2442, as amended by an amendment in the nature of a complete substitute, by voice vote.

VII. COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 24, 1990.

Hon. EDWARD M. KENNEDY,
Chairman, Committee on Labor and Human Resources,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 2442, the Occupational Safety and Health Hazards Victims' Rights Act, as ordered reported by the Senate Committee on Labor and Human Resources on June 27, 1990.

S. 2442 would allow employees who are injured or ill, or family members of employees who are killed, as a result of a workplace accident investigated by the Occupational Safety and Health Administration (OSHA), to receive free of charge, on request, a copy of the citation or report of no action following the investigation, and all public documents relating to such investigation. OSHA investigates an accident if the accident causes a fatality or five or more hospitalizations, or if an accident victim files a complaint with OSHA and requests an investigation. Due to an administrative directive issued in April 1990, OSHA now allows surviving family members or family members representing workers totally disabled by an accident to obtain releasable documents free of charge; workers not totally disabled generally have to pay the Freedom of Information fees in order to receive such documents. From fiscal years 1985 to 1989, an average of about 3,500 employees a year were injured in accidents investigated by OSHA. Therefore, CBO estimates that this provision would not result in significant costs to the federal goverment.

In addition, the bill would allow workplace injury victims, or the families of victims to meet with an authorized representative before a citation or report of no action is issued, to appear and participate at enforcement proceedings, and to partake in settlement discussions. If a victim were prevented from attending these meetings, or charged for documents relating to the accident, the victim would be entitled to reasonable attorney fees and costs. CBO cannot estimate the indirect costs to the federal government that could occur as a result of longer settlement deliberations or more

litigation cases or the possible direct costs resulting from the reimbursement of attorney fees.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

ROBERT D. REISCHAUER, *Director.*

VIII. REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of Rule XXVI of the Standing Rules of the Senate, the following statement of the regulatory impact of S. 2154 is made.

A. ESTIMATED NUMBER OF INDIVIDUALS AND BUSINESSES REGULATED AND THEIR GROUPS OR CLASSIFICATIONS

S. 2442 extends rights to employees injured or ill as a result of a workplace accident or condition. The bill also extend rights to a family member where the employee is killed or incapacitated. The rights are extended only upon request and only in cases involving accidents or conditions that result in an investigation under Section 8 of the OSH Act. According to the Department of Labor, 1,346 such investigations in the period from October 1988 to September 1989. Because the rights extended in S. 2442 are only extended in cases resulting in an investigation or inspection under section 8, and are contingent upon the victim making a request, the estimated number of individuals and businesses that will actually be affected by this measure is very small.

B. ECONOMIC IMPACT ON INDIVIDUALS, CONSUMERS, AND BUSINESSES AFFECTED

The Committee is unable to determine the precise economic impact the legislation would have on affected individuals, consumers and businesses.

One provision of S. 2442, extends to certain individuals the right to appear and make a statement before those conducting settlement negotiations. This provision may require some incidental expenses for employers being investigated for OSH Act violations. Such expenses would be minimal.

In addition, the victim participation required in S. 2442 may have the overall effect of increasing penalties assessed against individuals or employers whose OSH Act violations have caused injury or illness to employees. Any such expenses should be more than offset by the savings produced by the deterrent effect of S. 2442. Therefore, to the extent S. 2442 leads to higher penalties, S. 2442 should lead to greater compliance with occupational safety and health standards which, in turn, should result in significant economic and social benefits to employers and employees.

C. IMPACT OF THE ACT OF PERSONAL PRIVACY

S. 2442 should have no effect on personal privacy. S. 2442 does provide that victims be provided in a timely manner with certain documents relating to OSHA investigations. S. 2442 provides that victims shall receive copies of OSHA citations and investigative re-

ports in a timely fashion, and free of charge. This information is covered under the Freedom of Information Act (FOIA). S. 2442 provides only that the FOIA information be provided in a timely manner and free of charge.

D. Additional Paperwork, Time, and Costs

S. 2442 is not likely to result in significant additional paperwork, time or costs. The legislation would require that victims be provided with copies of certain documents. These costs should be minimal, particularly since OSHA has already implemented a policy to provide such documents to the family members of individuals who are killed as a result of a workplace accident or condition.

IX. Section-by-section Analysis

Section 1.—Provides the short title for the legislation.

Section 2.—States the purposes of the Act.

Section 3.—Amends the Occupational Safety and Health Act of 1970 to redesignate the numbers of some sections and to insert a new section 28.

Sec. 28.

(a) Provides definitions of the terms "accident", "family members" and "victim".

(b) provides that victims shall have the right to:

(1) meet with an OSHA representative who is conducting the investigation of the accident involving the victim;

(2) receive a copy of the citation, at no cost, if one is issued as a result of the accident involving the victim; and

(3) participate as a party in hearings involving the issuance of a citation as result of the accident involving the victim.

(c) Provides that, upon request, the Secretary shall extend the right to appear and make a statement before the parties conducting settlement negotiations to:

(1) an employee who suffers a serious bodily injury in an accident or condition that leads to an OSHA investigation;

(2) a family member of an employee, if the employee is killed or incapacitated in an accident or condition that leads to an OSHA investigation; and

(3) the employee representative.

(d) Provides that:

(1) a victim shall have the right to obtain, at no cost and within a reasonable period of time, a copy of all public documents relating to the accident or condition involving the victim; and

(2) witnesses interviewed as part of an OSHA investigation shall be advised of their right to waive confidentiality to victims.

(e) Provides the remedies available under this Act.

(f) Provides that the Secretary shall take reasonable actions to advise victims of their rights under this Act.

Section 4.—Conforms Section 10(c) of the Occupational Safety and Health Act of 1970 to the changes made in this Act.

Section 5.—Provides that this Act shall take effect upon passage.

X. MINORITY VIEWS OF MR. HATCH

We strongly oppose S. 2442 because the majority has failed to carry either of two burdens essential in a legislative context. First, the majority has failed to demonstrate a compelling need for this law. Those specific elements of S. 2442 which are supported by evidence of the need for such protection have been addressed via OSHA administrative directive. Insufficient reason is presented to justify duplication of this effort through codification. Second, the majority has presented insufficient evidence, and no evidence directly on point, to demonstrate an understanding of, or appreciation for, the sweeping legal changes beyond those contained in OSHA's administrative directive. Serious questions about the consequences of these provisions remain unaddressed.

I. Summary of Issues

The fundamental purpose for S. 2442 has already been accomplished in a reasonable, effective manner. On the basis of a comprehensive analysis of the legal issues contained in S. 2442, the Occupational Safety and Health Administration (OSHA) has placed into effect an administrative directive, Instruction CPL 2.89, which implements those portions of S. 2442 which are justified. Moreover, shortly after putting this Directive into effect, OSHA, through the Assistant Secretary of Labor for Occupational Safety and Health, Gerard Scannell, noted that several of the provisions in S. 2442 were not addressed in the Directive and offered a two-fold explanation. First, Assistant Secretary Scannell observed that more information was needed about certain elements of S. 2442. Those portions, he stated, raised serious operational and logistical questions which required research and investigation. Accordingly, based on the experience gained through the implementation of Instruction CPL 2.89, and the research and investigation of OSHA's experts in this area, Scannell promised to use this information as a basis for a possible expansion of the Directive. Lastly, Assistant Secretary Scannell noted that some provisions contained in S. 2442 were totally impractical or effected policy changes which conflicted with OSHA's fundamental mission. Those particulars, Scannell suggests, should be deleted.

In this report, the majority responds to the actions and concerns of the administration as follows. They note the existence of OSHA Instruction CPL 2.89, but argue that S. 2442 should, nonetheless, be enacted into law for three reasons: (1) because subsequent OSHA Administrators could overturn Instruction CPL 2.89 on "whim;" (2) because OSHA cannot guarantee that states having jurisdiction over workplace safety and health (state-plan states) will follow Instruction CPL 2.89; and (3) that S. 2442 contains provisions beyond

those addressed in Instruction CPL 2.89 which are, they argue, justified and reasonable protections.

Regarding criticism over the lack of evidence in those areas of law beyond the scope of Instruction CPL 2.89, the sponsors of the legislation argue that the need for their proposals is obvious, but neglect to substantiate such assertions with even the slightest evidence which is on point. Specifically, the sponsors of S. 2442 argue that Instruction CPL 2.89 is limited in scope to "victims" who have died as a result of workplace occurrences. While arguing that the scope should be expanded significantly, the sponsors fail to respond to OSHA's assertion that it would be logistically and administratively impossible for them to meet such onerous obligations as those which would result via such an expansion without significant alterations in all facets of OSHA's operations. Moreover, the majority ignores OSHA's promise to investigate ways in which the scope of Instruction CPL 2.89 could be expanded so as to avoid these logistical problems and instead dismiss these problems without acknowledging any appreciation for the relevant facts.

In a second major area, the sponsors of S. 2442 assert that an unprecedented expansion of current law, under which "victims" and their families would be included in settlement discussions, would have no negative consequence. Again, in doing so, the sponsors offer evidence for such a sweeping change which is, to be charitable, misleading, while failing to respond to points raised by Assistant Secretary Scannell regarding how such a policy would hinder rather than help OSHA perform its mission of the swift abatement of workplace hazards.

II. OSHA Instruction CPL 2.89

On April 13, 1990, OSHA Instruction CPL 2.89 was forwarded to all OSHA field offices. Contained therein are instructions that senior OSHA managers shall ensure that the policy and procedures described are followed in all relevant cases. Further, the Instruction also required OSHA senior managers to ensure that each state designee (state-plan states) have the Instruction fully explained and acknowledge both an understanding of the technical content of the policy and procedures, as well as to warrant that the state will comply with the terms of the policy or procedures or promulgate its own policy and procedures in this area which are "at least as effective" as the Federal Instruction.

While the entirety of OSHA Instruction CPL 2.89 is offered as an appendix to these minority views, as summarized by Assistant Secretary Scannell in testimony to the Senate Subcommittee on Employment and Productivity, this directive would effect the following:

> (1) The Directive "requires the Occupational Safety and Health Administration (OSHA) to contact the family by letter at the outsct of any investigation in which an employee is killed."
>
> (2) The family member is "offered the opportunity to meet in person with the OSHA staff to discuss the circumstances of the accident or illness and to share information about OSHA's investigation."

(3) "OSHA will provide family members with information about the purpose and scope of OSHA's investigations so that they will know what to expect as the inspection progresses."

(4) "OSHA will offer to notify the family periodically during the investigation and make special effort to contact them at investigation milestones, such as the issuance of a citation, completion of an informal conference, receipt of a notice of contest, and closing of the case.".

(5) "Family members will be provided with a free copy of citations upon request."

(6) "The highest priority will be assigned to processing requests from family members for copies of all other releasable information, which will (be provided) free of charge."

In addition, the United States Department of Labor is currently training and educating compliance personnel as a continuing effort to ensure the success of this directive. Moreover, OSHA is currently collecting data and evidence of the experiences faced by field personnel as they work within these new policy and procedural changes. Lastly, again as stated by Assistant Secretary Scannell, "following up on our new policy, (OSHA) will evaluate the directive and, if appropriate, expand the scope to include victims who have suffered totally incapacitating injuries or illnesses."

In sum, as the facts clearly indicate, the essence of S. 2442 has been addressed in OSHA Instruction CPL 2.89. That being the case, what remains is an inquiry as to the validity of the arguments that the scope of Instruction CPL 2.89 should be expanded and that its codification, with an expanded scope, is appropriate,

III. Concern Over Reversal of Instruction CPL 2.89 Based on "Administrative Whim" and the Ability of OSHA To Monitor the Compliance of State-Plan States

A. "ADMINISTRATIVE WHIM"

The argument of the sponsors of S. 2442 that a subsequent, "unfriendly" administration could reverse or otherwise alter the policies and procedures set forth in OSHA Instruction CPL 2.89 in a manner harmful to the objectives of this legislation is without foundation.

OSHA's day-to-day operating procedures are set forth in the Field Operations Manual (FOM). The FOM provides guidelines and sets forth basic policy and instruction to assure uniform enforcement action. The FOM contains all matters relating to inspection procedures, selection of workplaces for inspection, citation issuance procedures, the proper methodology for assessing penalties, etc. OSHA's FOM is a collection of individual Instructions, of which Instruction 2.89 is one of many. Thus, the issues and procedures contemplated under S. 2442 are of the exact nature as the issues addressed under OSHA's FOM.

This being the case, one must question whether the arguments forwarded by the sponsors of S. 2442 do not suggest the need to codify the pages upon pages of other policies and procedures contained in OSHA's Field Operations Manual. From the perspective of the minority, one could make the same argument for virtually all Instructions in the FOM thus turning the Occupational Safety

and Health Act into a telephone book. However, it seems to us such an endeavor would be better left pending until the "unfriendly administrator" comes along and performs his or her dirty deed. We counsel the majority to do the same and note that any future reversal would likely trigger oversight hearings in Congress during which a new OSHA Administrator would be forced to provide justification for such an action.

In any event, the issue of greater specificity in legislation versus the "micromanagement" of administrative agencies by the legislature is an old one. However, debate in the legislative context is normally reserved for situations whereunder the administrative agency has acted in a manner contrary to the intent of Congress, or in situations where the agency fails to act at all. In this situation, we have an agency which has acted in a manner which, as the majority admits, is consistent with their interests. Thus, the critical question is why must Congress take duplicative action when the only justification offered is to avoid action that might be taken at some future date.

In addition, the advantage of administrative directives over legislation is the very point raising the concern of the majority. Specifically, Instructions such as the one at issue can easily be expanded to accommodate new areas of concern. For instance, now that this directive is in effect, certain omissions or errors may be uncovered. Should such be the case in the legislative process, the difficult process of legislative amendment is necessary. In contrast, the Instruction could easily be revised to accommodate the positive elements overlooked.

In sum, if the majority fears subsequent reversal or deletion of this instruction, since we support its purpose and effect, they have our commitment to support an appropriate legislative response. However, until such time, we believe it wise to gather experience with this new policy and deal with subsequent "unfriendly" administrators at the appropriate time.

B. CONCERN OVER STATE IMPLEMENTATION

The majority's concern that OSHA lacks the ability to require the implementation of this Instruction among those states with jurisdiction over safety and health (state-plan states) is likewise, without foundation.

As required under Instruction CPL 2.89, each state has already been informed of the requirements of this directive. In addition, each state was required to notify OSHA of its intention to follow the procedures set forth in the Instruction or promulgate its own policy which "is at least as effective" as the policy requirements of the OSHA Instruction. In addition, under the existing Occupational safety and Health Act, administrative remedies such as involuntary termination proceedings for state plans whose standards and procedures are not "at least as effective as" the Federal law.

In this case, each state has already notified OSHA of an intention to follow the specifics of Instruction 2.89. Indeed, they are already required under section 18 of the Act to do so. Thus, similar to its fear that the directive will be deleted or amended in the future, the fear that states will refuse to do that which they have

promised is a transparent attempt to find a reason to justify passage of legislation when there is otherwise none.

Finally, the generic concern of the sponsors of S. 2442 are equally applicable to all facets of Federal and state-plan state operations. If such a generic argument is given serious consideration, the conclusion is to eliminate the ability of states to have jurisdiction over safety and health in their states. Otherwise, if we simply codified in Federal law that which exists in administrative directive, how is OSHA or the Congress any better off in our ability to ensure state compliance?

IV. Lack of any Evidence Justifying an Expansion of Law in Areas not Addressed by OSHA Instruction CPL 2.89

The majority notes the presence of two "key provisions" not included in OSHA's directive: (1) an expanded scope of coverage; and (2) "victim" participation in settlement agreements. Rather than justifications for enactment of S. 2442, we believe these areas are unjustifiable expansions of current law which would have sweeping consequences which the majority has failed to address or specifically passed over.

A. SCOPE OF VICTIM'S PROTECTION

OSHA Instruction CPL 2.89 covers the family members of victims who have died as a result of a workplace accident. In contrast, the scope of S. 2442 extends to "family members of victims who are incapacitated or those who become seriously ill," as well as "the injured workers themselves."

In testimony delivered by Assistant Secretary for Occupational Safety and Health Gerard Scannell, the administration notes that "in 1988 there were 6.4 million workplace injuries and illnesses, 3 million of which were serious." Thus, the scope of S. 2442 would be so expansive that an Assistant Secretary Scannel notes, it would be "logistically impossible" for OSHA to devote the resources necessary to comply with the mandates in this legislation.

If that were not sufficient, Scannel points out that OSHA currently does not receive accident reports when individual employees are injured. Thus, it is logistically impossible for OSHA to address the demands of S. 2442 absent sweeping changes in the most fundamental aspects of OSHA's operations. Yet, these logistical operational impossibilities are not addressed in the majority's analysis.

But more important than any other aspect of this particular issue is the majority's total disregard for a sensible request made by Assistant secretary Scannell on behalf of the Secretary of Labor and the fact that the majority failed to note a promise made in good faith by Scannell.

In formal testimony, Scannell explained the problems mentioned above and promised to conduct extensive research on a possible expansion of the scope of OSHA Instruction CPL 2.89 based upon the information gathered and the experience gained through the implementation of the Directive. This proposal seems to us a logical request. The Assistant Secretary is reasonably asking to be given time to explore ways in which real logistical problems may be over-

come without wholesale changes in the operational scheme of the agency.

B. PARTICIPATION OF VICTIMS IN SETTLEMENT AGREEMENTS

The conclusion of the majority that "victim participation in settlement discussions would facilitate rather than disrupt such proceedings in ludicrous and indefensible. No evidence is offered to support this erroneous conclusion other than misleading or totally incorrect evidence which can rapidly be discredited.

The most fundamental of OSHA's missions is to reach agreement and effect the abatement of workplace hazards. Thus, only policy which would promote confrontation and prolong legal process is inconsistent with this mission. As innocent as victim participation in settlement agreement proceedings section 10 hearings may appear, legal delay and confrontation would be the consequence. As Assistant Secretary Scannell stated in official testimony, "we are concerned that the presence of families in settlement conferences would jeopardize the success of those discussions and, as you know, the longer a case remains unresolved, the longer the abatement of the hazard is delayed to the potential harm of workers still on the job."

To demonstrate this point, Assistant Secretary Scannell offered the analysis of a prosecutor involving the victim of a crime in the discussions surrounding a plea bargain. So too, observes Scannell, "it would be inappropriate to involve the victim of an industrial accident in the settlement of an OSHA case." We agree with this general proposition and believe that the analogies offered by the majority are totally inaccurate for the following reasons.

First, the Department of Justice's Office for Victims of Crime which monitors state and federal programs for victims is totally unaware of *any* (emphasis added) precedent, under common law or statutory authority, for the rights under S. 2442 which would be bestowed upon victims under civil law. In fact, no evidence is even suggested otherwise by the majority or any knowledgeable organization. Thus, this legislation represents a major expansion of law with no explanation offered by its sponsors.

Victims' rights to the extent that they do exist, accrue only in the context of criminal law enforcement. As such, any analogy to civil enforcement is difficult to justify because it is like contrasting fruits with vegetables; while some of both are tiny and round and nutritional, that is about as far as the analogy will take one. The fact that the majority fails to note this contrast in its so-called precedents is baffling. But, with this significant difference in mind, the following facts are added to the majority's inadequate analysis.

Most of the rights provided to victims of *violent* crimes under state law concern requirements that *notice* of any indictment, hearing, plea negotiation, conviction or acquittal, or post-conviction review concerning a defendant be given to a victim. However, such laws do not authorize or require participation of a victim in *any* such proceeding.

A perfect example of these differences is the law in the State of Illinois which requires the above mentioned giving of *notice* but does not grant participatory rights. The only significant feature of

Illinois law which arises outside of this general statement is a "victim impact statement," which again arises only in criminal cases. However, such a statement is submitted in writing or presented orally at the time of sentencing and no right accrues for such in any phase short of the final penalty determination stage. In other words, it is not applicable in the plea bargaining context which, if it wouldn't be inappropriate to mix criminal proceedings with civil proceedings, would be analogous to a settlement discussion.

Thus, not only does S. 2442 journey into areas of the law not currently in existence, e.g., victims rights in civil law context, but it also exceeds the boundaries of remotely analogous provisions of criminal law.

Another misleading and incorrect assertion by the majority is that similar rights exist under current law covering plaintiffs in class-action lawsuits. In fact, there are marked differences between the objectives sought in OSHA and those applicable to members of a certified class at a "fairness" hearing.

In general, a "fairness" hearing in the class action context is designed to provide an opportunity for *unnamed* plaintiff class members to be heard on the issue of whether a proposed settlement is equitable to them, as *unnamed parties.* This ensures that the class representatives adequately represented their interests, and averts the focus of the inquiry away from the "victims" (i.e., the named plaintiffs) and toward the members of the class at large. Permitting victim participation at OSHA settlement conferences would achieve opposite and conflicting ends; i.e., diverting attention away from the employees in the workplace (those who OSHA is charged with representing through its goal of rapid abatement of hazards) and focusing it on the "victim," whose interests are more than likely antithetical to those of the affected employees in the unit-at-large.

V. "Privacy" Concerns

An issue not addressed by the majority which deserves mention is concern over how this legislation would affect the confidentiality of statements given by any witness as part of an inspection or investigation. Under the proposed legislation, any witness who is interviewed must be provided with a form on which they can indicate a willingness to waive confidentiality so that victims, their families, and the representative unions can obtain copies of these documents.

In brief, recent case law suggest that once confidentiality is waived, release of such material may not be limited to victims. In other words, the world may demand access to these statements once this confidentiality is waived.

We believe that this outcome could easily be as detrimental to victims and their families as to the witnesses. Certainly, serious inquiry ought to be extended to this area; an inquiry has been obviously overlooked by the majority.

VI. Conclusion

It is difficult to find examples of instances where so little credible evidence is offered to justify such sweeping legislative changes as those proposed under S. 2442. This deficiency is inexcusable and should be fatal to the prospects of passage of this proposed legislation in any case. But in this case: (1) most of what is proposed has already been done following the thought research of the Occupational Safety and Health Administration through the implementation of Instruction CPL 2.89; and (2) the Assistant Secretary for OSHA has promised to use the talents of his experts and based on the experience and knowledge gathered through the operation of Instruction CPL 2.89, to recommend appropriate changes that are warranted. Thus, in our view, there is no basis for the majority's insistance on moving forward with S. 2442 at this particular time.

Orrin Hatch.

XI. CHANGES IN EXISTING LAW

In compliance with rule XXVI paragraph 12 of the Standing Rules of the Senate, the following provides a print of the statute or the part of section thereof to be amended or replaced (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970

* * * * * * *

PUBLIC LAW 91-596

* * * * * * *

Sec. 27. * * *

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SEC. 28. OCCUPATIONAL SAFETY AND HEALTH HAZARDS VICTIMS' RIGHTS.

(a) DEFINITIONS.—As used in this section:

(1) ACCIDENT.—The term "accident" means the circumstances relating to the death, injury, or illness of an employee.

(2) FAMILY MEMBER.—

(A) IN GENERAL.—The term "family member" may include a parent, legal guardian, spouse, brother, sister, or child of an employee.

(B) NO FAMILY MEMBER.—In a case in which a family member cannot be identified and a deceased employee has no legal representative, the Secretary may grant "family member" status to any interested coemployee or acquaintance of the deceased employee.

(3) VICTIM.—The term "victim" means—

(A) an employee who has sustained an injury or suffered an illness as a result of an accident or condition that results in an inspection or investigation conducted under section 8; or

(B) a family member of an employee, if—

(i) the employee is killed as a result of an accident or condition that results in an inspection or investigation conducted under section 8; or

(ii) the employee sustains an injury as a result of an accident or condition that results in an inspection or investigation conducted under section 8, and the employee cannot reasonably exercise the rights of the employee under this section.

(b) VICTIMS' RIGHTS.—Nothwithstanding any other provision of law, on request, a victim shall be afforded the right (with respect to an injury, illness, or death involving the victim) to—

(1) meet with the Secretary or an authorized representative relating to the death, injury, or illness of an employee prior to the issuance of a citation, or report of no action, as the result of an inspection or investigation conducted under section 8;

(2) receive, at no cost, a copy of the citation or report at the time of issuance; and

(3) appear and participate as a party at all proceedings conducted under section 10.

(c) SETTLEMENT DISCUSSIONS.—Prior to entering into a settlement agreement as a result of an inspection or investigation conducted under section 8, on request, the Secretary shall provide an opportunity to appear and make a statement before the parties conducting the settlement negotiations to—

(1) the employee who suffered a serious bodily injury as a result of an accident or condition that resulted in the inspection or investigation;

(2) a family member of the employee, if the family member is a victim; and

(3) the employee representative of the employee.

(d) VICTIMS' ACCESS TO INFORMATION AND DOCUMENTS.—

(1) IN GENERAL.—A victim shall have the right to obtain, at no cost and within a reasonable period of time, all public documents relating to an inspection or investigation by the Secretary into an accident resulting in the death, injury, or illness of an employee.

(2) WAIVER OF WITNESS CONFIDENTIALITY.—If a witness is interviewed as part of an inspection or investigation conducted under this Act, the Secretary shall provide the witness with a form on which the witness shall indicate—

(A) the willingness of the witness to waive confidentiality to victims; or

(B) the unwillingness of the witness to waive confidentiality to victims.

(e) REMEDIES.—On a violation of this section, in addition to any other remedies that might be available to a victim under Federal or State law, a victim shall be entitled to—

(1) declaratory relief;

(2) injunctive relief;

(3) any costs incurred by the victim in securing the documents referred to in subsections (b)(2) and (c); and

(4) reasonable attorney fees and costs.

(f) NOTIFICATION.—The Secretary shall take reasonable actions to inform victims of their rights under this section.

ECONOMIC ASSISTANCE TO SMALL BUSINESS

SEC. [*29.*] (a) Section 7(b) of the Small Business Act, as amended, is amended—

* * * * * * *

ADDITIONAL ASSISTANT SECRETARY OF LABOR

SEC. [*30.*] (a) Section 2 of the Act of April 17, 1946 (60 Stat. 91) as amended (29 U.S.C. 553) is amended by—

* * * * * * *

EMERGENCY LOCATOR BEACONS

SEC. [*31.*] Section 601 of the Federal Aviation Act of 1958 is amended by inserting at the end thereof a new subsection as follows:

* * * * * * *

ADDITIONAL POSITIONS

SEC. [*32.*] Section 5108(c) of title 5, United States Code, is amended by—

* * * * * * *

SEPARABILITY

SEC. [*33.*] If any provision of this Act, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

APPROPRIATIONS

SEC. [*34.*] There are authorized to be appropriated to carry out this Act for each fiscal year such sums as the Congress shall deem necessary.

EFFECTIVE DATE

SEC. [*35.*] This Act shall take effect one hundred and twenty days after the date of its enactment.

Approved December 29, 1970.

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OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970

TITLE 29—UNITED STATES CODE

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§ 659. Enforcement procedures

(c) Advisement of Commission by Secretary of notification of contest by employer of citation or notification or of filing of notice by any employee or representative of employees; hearing by Commission; orders of Commission and Secretary; rules of procedure

If an employer notifies the Secretary that he intends to contest a citation issued under section 658(a) of this title or notification issued under subsection (a) or (b) of this section, or if, within fifteen working days of the issuance of a citation under section 658(a) of this title, any employee or representative of employees files a

notice with the Secretary alleging that the period of time fixed in the citation for the abatement of the violation is unreasonable, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5 but without regard to subsection (a)(3) of such section). The Commission shall thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief, and such order shall become final thirty days after its issuance. Upon a showing by an employer of a good faith effort to comply with the abatement requirements of a citation, and that abatement has not been completed because of factors beyond his reasonable control, the Secretary, after an opportunity for a hearing as provided in this subsection, shall issue an order affirming or modifying the abatement requirements in such citation. The rules of procedure prescribed by the Commission shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this subsection. *A victim shall have the opportunity to participate in a proceeding conducted under this section in accordance with section 28.*

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APPENDIX

U.S. DEPARTMENT OF LABOR,
OCCUPATIONAL SAFETY AND HEALTH,
Washington, DC, April 13, 1990.

OSHA Instruction CPL 2.89.
Directorate of Compliance Programs.

Subject: Incorporating the Family of Accident or Illness Victims into the Fatality Investigations

A. *Purpose.*—This instruction provides policy and procedural guidance for dealing with the families of accident or illness victims in connection with the investigations of workplace fatalities.

B. *Scope.*—This instruction applies OSHA-wide.

C. *References.*

1. OSHA Instruction CPL 2.45B, June 14, 1989, the Revised Field Operations Manual (FOM), Chapter VIII, Fatality/Catastrophe Investigations and Chapter XIV, Disclosure.

2. OSHA Instruction CPL 2.77, December 30, 1989, Critical Fatality-Catastrophe Investigations.

D. *Action.*—Regional Administrators and Area Directors shall ensure that the policy and procedures described in this instruction are followed in all fatality investigations. This instruction will be incorporated into a future revision of the FOM.

E. *Federal Program Changes (FPC).*—This instruction describes a Federal Program Change which affects State Programs. Each Regional Administrator shall:

1. Ensure that a copy of this change is promptly forwarded to each State designee, using a format consistent with the Plan Change Two-way Memorandum in Appendix F, OSHA Instruction STP 2.22A, CH-2.

2. Explain the technical content of this change to the State designee as requested.

3. Ensure that State designees are asked to acknowledge receipt of this Federal program change in writing to the Regional Administrator as soon as the State's intention is known, but not later than 70 calendar days after the date of issuance (10 days for mailing and 60 days for response). This acknowledgement must include (1) the State's intention to follow OSHA's policies and procedures describe in this instruction, (2) a description of the State's alternative policy and/or procedures which is "at least as effective" as the Federal policy and/or procedure, or (3) the reasons why the change should not apply to that State.

a. If a State intends to follow OSHA's policy described in this instruction, the State must submit either a revised version of this instruction, adapted as appropriate to reference State law, regulations and administrative structure, or a cover sheet describing how references in this instruction correspond to the State's structure. The State's acknowledgement on the Plan change Two-way Memorandum may fulfill the plan supplement requirement if the appropriate documentation is provided.

b. If the State adopts an alternative to Federal enforcement policies, the State's submission must identify and provide a rationale for all substantial differences from Federal policies in order for OSHA to judge whether a different State procedure is as effective as comparable Federal policy. It also must provide a general description of the policy and any plans the State has developed for implementing the change.

4. Ensure that the State designees submit State plan supplements in response to this instruction, which will be incorporated into the FOM, with the next FOM change instruction. Plan change documentation, through State FOM/OTM plan supplements, is not required to be submitted more than twice a year in response to OSHA's incorporation of Federal program changes in the FOM/OTM. If the revised manuals are issues on their target dates (April 12 and Octo-

ber 1), the States shall have 6 months from their issuance date to submit a plan supplement in response to the issuance of the FOM or OTM change. If an FOM/OTM change is not issued within six months of a change directive's issuance, follow the guidelines in paragraph I.1.(3)(b) of STP 2.22A CH-3 for the State's response.

5. Advise the State designees that the Regional Administrator is available to coordinate with the State in identifying sources of training which meet the requirements in Paragraph I.

6. Review policies, instructions and guidelines issued by the State to determine that this change has been communicated to State personnel.

F. *Background.*—The FOM contains current agency policy governing the conduct of fatality investigation. However, the FOM does not address procedures to be followed by a Compliance Officer when dealing with the surviving family of a fatal workplace accident or illness victim.

1. Currently the FOM, Chapter VIII, Fatality/Catastrophe Investigations, states that OSHA's primary objectives in conducting these investigations are to determine the causes of the accident where possible, whether violations of the standards have occurred, and what effects the violations of the standards had on the accident or illness.

2. OSHA has often obtained valuable information concerning the circumstances of the accident when the cooperation of the victim's family has been sought. The family, through an exchange of information and with a point of contact with OSHA, also has been kept apprised of the course of the the investigation.

3. An exclusive focus on the technical aspects of the investigation has, in some instances, resulted in distracting due attention from the human aspects of workplace deaths (suffering, sorrow and exasperation) that the family encounters when dealing with bureaucracies in both the government and the private sector.

G. *Policy.*—Family members of employees involved in fatal occupational accidents or illnesses shall be contacted at an early point in the investigation, given an opportunity to discuss the circumstances of the accident or illness and provided timely and accurate information at all stages of the investigation as described in this instruction.

1. It shall be OSHA policy, subject to the requirements of 29 CFR Part 70, to waive fees otherwise assessable under the Freedom of Information Act (FOIA) when providing copies of disclosable portions of the accident investigation files to surviving family members or family members representing workers totally disabled by a work accident.

H. *Procedures.*—The procedures for conducting fatality investigations outlined in the FOM, Chapter VIII, shall be modified to incorporate the following changes:

1. As soon as practicable after initiating the investigation, the CSHO shall attempt to compile a list of all of the accident victims and their current addresses, along with the names of individual(s) listed in the employer's records as next-of-kin (family member(s)) or person(s) to contact in the event of an emergency.

2. An information letter sample letter—Appendix A) shall be sent to the family member(s) or the person(s) listed as the emergency contact person(s) indicated on the victims' employment records within 5 working days of the time their identities have been established.

a. The issuance of this letter shall be documented on the case file diary sheet.

b. The minimum contents of this initial contact letter shall be as follows:

(1) The purpose and scope of OSHA's investigation.

(2) A brief outline of OSHA's civil enforcement process, including standards, citations, and penalty system.

(3) A request for information relevant to the investigation. This request shall include an offer to meet personally with appropriate persons to discuss any information they may have to offer.

(4) A statement offering OSHA's assistance throughout the investigation. This assistance will be at a minimum:

(a) Being informed at inspection milestones; and,

(b) The offer to meet personally to answer questions.

(c) Subject to the requirements of 29 CFR Part 70, a free copy of releasable information from the case file at the time the file is closed, i.e., after the investigation is completed and any resulting OSHA enforcement proceedings have been concluded.

c. If the next-of-kin or the emergency contact person(s) cannot be determined through the employment records or fellow-employee interviews, the Area Director shall make a reasonable effort to identify the next-of-kin through a search of police reports, hospital admission records, coroner's records, and newspapers.

d. When the additional search does not identify a family member, the case file shall be documented to reflect the search and the extent to which it was carried out.

e. If the letter is returned as undeliverable, the letter and envelope shall be put in the case file and the date of return entered in the case file.

3. The compliance officer, when taking a statement pursuant to H.2.b.(3), shall explain that the interview is confidential. The greatest sensitivity and professionalism is required for such an interview. The information received must be carefully evaluated and corroborated during the investigation.

4. Follow-up contact shall be maintained with a key family member or other contact person, when requested so that the survivors can be kept up-to-date on the status of the investigation. Such contact can be by personal visit, telephone or letter, as requested by the family member. These contacts shall be made at appropriate times; e.g., after the citation issuance, after an informal conference has been conducted, after the contest has been received, and when the case has been closed.

5. The victim's family members shall be provided a copy of all citations issued as a result of the accident investigation within 5 working days of issuance.

6. All OSHA staff are cautioned, when discussing the Freedom of Information Act (FOIA) with the family, not to mislead them about the speed with which they can obtain a copy of the disclosable information prior to closing the case file. Staff are further cautioned that the employer's rights must be protected. There should be no premature release of facts or findings during any meeting with non-OSHA personnel, before the investigation and subsequent litigation is completed.

I. *Training.* All employees (Area Directors, Supervisors, and CSHOs) associated with fatality investigations shall be trained to recognize and cope with *"Critical Incident Stress."*

1. The training shall include:

a. The definition and characteristics of a "Critical Incident";

b. The normal stress reactions experienced by employers/employees and their families and friends; and

c. How to use these concepts in an OSHA investigation to successfully complete the assignment.

NOTE.—Training may be in-house, through the OSHA Training Institute when available, by contract with local law enforcement trainers or by any other source deemed appropriate by the Regional Administrator.

2. The initial training for current employees shall be completed within 6 months of the effective date of this instruction.

G.F. SCANNELL,
Assistant Secretary.

APPENDIX A

Family Information Letter.

DEAR _____, Please accept our sincerest sympathy regarding the tragic accident that resulted in the death of (*victim's name*).

The Occupational Safety and Health Administration (OSHA) of the U.S. Department of Labor is conducting an investigation of the accident and would like to keep you informed, if you so desire, of our developments and findings.

Investigations of workplace accidents are initiated by OSHA to determine:

1. The cause of the accident.

2. Whether a violation of OSHA safety and health standards related to the accident occurred.

3. What effect the standard violation had on the occurrence of the accident.

If standards were violated, OSHA may issue citations and seek civil or criminal penalties against the employer.

If you feel that you or another family member may have information concerning this accident, please contact us so that an interview can be scheduled.

The Freedom of Information Act (FOIA) governs the release of information concerning accident investigations concluded by OSHA. OSHA does not release information from enforcement investigation files until the file is closed, that is, until the

investigation has been completed and any resulting litigation is conducted. If you so desire, we will keep you informed of the progress of the investigation through copies of citations, appeal letters, results of any informal settlements and any other actions taken toward the resolution of this matter.

Once the investigation file is closed, the releasable portions of the file will be made available to you on request. OSHA's policy is to waive fees for Freedom of Information Act requests in these circumstances, subject to the requirements of 29 CFR Part 70.

If you have any questions regarding the investigation or any of the above procedures, please feel free to contact me:

Area Director
USDOL/OSHA
Somewhere Street
Anywhere, State 12345
Telephone _____

Again, please accept our heartfelt condolences and please let us know if we can be of any assistance to you, your family, or friends.

Sincerely,

_____ _____

Area Director.

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